Sabah Penang Development Sdn Bhd v Yeng Hing Enterprise Sdn Bhd

HIGH COURT (SANDAKAN) — ORIGINATING MOTION NO C50 OF 1984
JOHN CHONG J
30 MARCH 1996

Companies and Corporations *— Shares — Rectification of register — Court's discretion — When exercised — Whether suspension of applicant's rights and privileges is ground for remedy — Whether laches is a bar to relief — Companies Act 1965 s 162*

The applicant was at all material times registered as a holder of 2,399,999 shares in the respondent company. The said shares were said to have been paid for by two cheques dated 21 August 1973 and 16 February 1974 from the applicant in favour of the respondent but no share certificates had been issued to the applicant in respect thereof. In 1980 the respondent discovered that in the applicant's returns to the Registrar of Companies, the applicant did not disclose that it was a shareholder of the respondent. The applicant was asked by the respondent to produce its accounts to prove that it held shares in the respondent but the applicant failed to do so. The respondent then resolved at its extraordinary general meeting on 31 December 1981 to suspend the applicant's shares pending further investigation and resolution. The applicant then filed a notice of motion for, inter alia, an order pursuant to s 162 of the Companies Act 1965 ('the Act') to rectify the respondent's register of members.

Held, dismissing the applicant's motion:

(1) The jurisdiction of the court to grant the summary remedy to rectify the register of members of a company under s 162 of the Act is general but the exercise of it is discretionary. The discretion will only be exercised in favour of the applicant where the case is clear and free from difficulty or material doubt. Where the case is complicated and there is doubt as to the bona fides of the transaction, or where the case involves complicated questions of law and fact, the court will refuse to order rectification on a motion but will leave the applicant to seek rectification by way of an action (see p 594I, 595A; *Re Heaton Steel & Iron Co, Simpson's Case* (1869) 21 LT 629, *Luchmee Chund, Luchmee Chund v Bengal Coal Co* (1988) ILR 8 Cal 317 and *Re Len Chee Omnibus Co Ltd* [1969] 2 MLJ 202 followed).

(2) The suspension of the applicant's rights and privileges as a member was not a ground for rectification of the register of members under s 162 of the Act. 'Suspension' merely operated as a temporary privation of rights and privileges of a member without his name being removed or erased from the register, whereas the word 'omitted' in s 162 involved either the non-inclusion or the removal of the name of the member from the

register, which was a total deprivation of membership (see p 595I). A

(3) Even assuming that s 162 of the Act were applicable in this case, the facts cast a serious doubt on the bona fides of the transaction. In the circumstances it would not be right to dispose of the matter summarily and the case should be dealt with by way of an action (see p 596B, D). B

(4) The delay on the part of the applicant in taking out the motion three years after it had knowledge that its rights were affected was unreasonable and the applicant was guilty of laches which was sufficient to deprive it of the relief sought under s 162 of the Act (see p 596G; *Re Len Chee Omnibus Co Ltd* [1969] 2 MLJ 202 and *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 244 followed). C

[Bahasa Malaysia summary

Pemohon telah pada semua waktu material didaftarkan sebagai pemegang 2,399,999 saham di dalam syarikat penentang. Saham-saham tersebut dikatakan telah dibayar untuknya melalui dua cek bertarikh 21 Ogos 1973 dan 16 Februari 1974 dari pemohon atas nama penentang tetapi tiada sijil saham dikeluarkan kepada pemohon berkenaannya. Dalam tahun 1980 penentang mendapat tahu bahawa dalam penyata pemohon kepada Pendaftar Syarikat-Syarikat, pemohon telah tidak mendedahkan bahawa ia adalah pemegang saham penentang. Pemohon telah diminta oleh penentang untuk mengemukakan akaunnya untuk membuktikan bahawa ia memegang saham dalam penentang tetapi pemohon telah gagal berbuat demikian. Maka penentang membuat penetapan di mesyuarat am luarbiasanya pada 31 Disember 1981 untuk menggantungkan saham pemohon sementara menunggu penyiasatan dan penetapan lanjut. Pemohon kemudiannya memfailkan notis usul untuk, antara lainnya, suatu perintah menurut s 162 Akta Syarikat 1965 ('Akta itu') untuk pembetulan daftar ahli-ahli. D E F G

Diputuskan, menolak usul pemohon:

(1) Bidang kuasa mahkamah untuk memberi remedi terus untuk membetulkan daftar ahli-ahli sesebuah syarikat di bawah s 162 Akta itu adalah am tetapi untuk menjalankannya adalah menurut budi bicara. Budi bicara itu akan hanya dijalankan memihak pemohon di mana kes tersebut adalah jelas dan bebas daripada kerumitan atau keraguan material. Di mana kes tersebut adalah rumit dan bona fides transaksi tersebut diragui, atau di mana kes tersebut melibatkan persoalan undang-undang dan fakta yang rumit, mahkamah akan enggan memerintahkan pembetulan atas usul tetapi akan membiarkan pemohon untuk meminta pembetulan melalui satu tindakan (lihat ms 594I, 595A; *Re Heaton Steel & Iron Co, Simpson's Case* (1869) 21 LT 629, *Luchmee Chund, Luchmee Chund v Bengal Coal Co* (1988) ILR 8 Cal 317 dan *Re Len Chee Omnibus Co Ltd* [1969] 2 MLJ 202 diikut). H I

(2) Penggantungan hak dan keistimewaan pemohon sebagai ahli bukanlah satu alasan untuk pembetulan daftar ahli-ahli di bawah s 162 Akta itu. 'Penggantungan' cuma beroperasi sebagai suatu penafian sementara hak dan keistimewaan seorang ahli tanpa namanya dikeluarkan atau dibatalkan daripada daftar, manakala perkataan 'ditinggalkan' dalam s 162 melibatkan sama ada ketidakmasukan atau pembatalan nama ahli daripada daftar, yang merupakan penafian sepenuhnya keahlian (lihat ms 595I).

(3) Biarpun dianggap bahawa s 162 Akta itu adalah terpakai dalam kes ini, fakta-fakta menimbulkan keraguan yang serius atas bona fides urusniaga itu. Dalam hal keadaan itu adalah tidak wajar untuk menyelesaikan perkara ini secara terus dan kes ini patut dikendalikan melalui satu tindakan (lihat ms 596B, D).

(4) Kelewatan di pihak pemohon dalam mengeluarkan usul tiga tahun selepas ia mendapat tahu bahawa haknya terjejas adalah tidak munasabah dan pemohon adalah bersalah untuk laches yang adalah mencukupi untuk menafikan pemohon relief yang dipohon di bawah s 162 Akta itu (lihat ms 596G; *Re Len Chee Omnibus Co Ltd* [1969] 2 MLJ 202 dan *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 244 diikut).]

[*Editorial Note*: The applicants have appealed to the Court of Appeal vide Civil Appeal No S–02–255–96.]

Notes

For a case on rectification of register see 3 Mallal's Digest (4th Ed, 1994 Reissue) para 346.

Cases referred to

Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid [1979] 2 MLJ 244

Heaton Steel & Iron Co, Re, Simpson's Case (1869) 21 LT 629

Len Chee Omnibus Co Ltd, Re [1969] 2 MLJ 202

Luchmee Chund, Luchmee Chund v Bengal Coal Co (1988) ILR 8 Cal 317

Legislation referred to

Companies Act 1965 s 162

Chan Wing Kong (William Liaw, Chan & Co) for the applicant.
David Fung (Alex Pang & Co) for the respondent.

Cur Adv Vult

John Chong J: By this originating motion dated 10 October 1984 (as amended), the applicant, Sabah Penang Development Sdn Bhd, applied for an order:

(a) pursuant to s 162 of the Companies Act 1965, that the register of members of the respondent shall be rectified by confirming the said applicant, Sabah Penang Development Sdn Bhd as holder of 2,399,999

ordinary shares of the respondent and the deletion of any suspension of the said shares;

(b) that the respondent shall forthwith or within such time as this Honourable Court may deem fit issue the appropriate share certificates to the said 2,399,999 shares;

(c) that the applicant shall have the right to exercise and enjoy all rights and privileges attached to the said shares;

(d) declaring that the suspension of the said shares and the records of the said suspension in the register of members are unlawful, null and void and of no effect;

(e) that the respondent do give to the applicant immediate inspection of the minutes book in respect of all proceedings of directors and general meetings of the respondent and permit the applicant to extract copies of the minutes as the applicant may deem proper;

(f) that notice of such rectification shall be given forthwith to the Registrar of Companies or that other orders may be made in the premises as the court shall deem fit;

(g) that the respondent shall pay the applicant the damages the applicant has sustained by reason of the respondent having suspended the said shares and for that purpose that an inquiry be directed; and

(h) the respondent do pay to the applicant the costs of this application and of the said inquiry.

The application is supported by two affidavits of Hiew Kat Kee ('Hiew'), a director of the applicant, respectively affirmed on 24 September 1984 and 11 August 1995. It is opposed by the respondent on whose behalf three affidavits were filed, one by its secretary, Chin Thin Cho, affirmed on 10 February 1990, and two by its then secretary cum director, Chung Mui Fatt, affirmed on 28 February 1995 and 1 December 1995.

The applicant was at all material times registered as a shareholder of the respondent, Yeng Hing Enterprise Sdn Bhd ('the company'), which was incorporated on 15 August 1973 under the Companies Act 1965 as a company limited by shares, with an authorized capital of RM10m divided into 10 million shares of RM1 each. The annual return of the company dated 3 April 1980 (exh H-3) and filed with the Registrar of Companies shows that the applicant was the holder of 2,399,999 shares in the company. The said shares are said to have been fully paid by means of two cheques issued by the applicant in favour of the company, ie, one dated 21 August 1973 for RM640,000 and the other dated 16 February 1974 for RM1,760,000 (exh HKK-2) but no certificates in respect thereof have been issued to the applicant. By letter dated 30 September 1981 (exh H-4), the secretary of the company informed the applicant that by a resolution of an extraordinary general meeting of the company held on 2 September 1981 the company would not recognize the applicant as a shareholder and that the applicant held no shares in the company. However, in the company's annual return dated 31 December 1981 (exh H-5), it was stated that the applicant's shares were suspended at the company's annual general meeting on 31 December 1981.

A The applicant says that the company had no right or power in law, equity or under its memorandum and articles of association to either (a) not recognize the applicant as a shareholder or to declare that the applicant held no shares in the company; or (b) to suspend the applicant's shares, and contends that the company's actions as aforesaid are ultra vires in law and against its memorandum and articles of association and are accordingly B void and of no effect whatsoever. The applicant further says that despite requests the company has failed, neglected and/or refused to supply it with copies of the minutes of the general meetings wherein the said actions were resolved, contending that it is entitled to receive and the company is obliged to supply it with the said minutes. These are the facts that led to C the making by the applicant of the application for the relief above referred to.

In contesting the application, the company gave an explanation as to why it took the actions complained of by the applicant. The explanation as gleaned from its affidavits is this. The company had all along believed that D the applicant held shares in the company but discovered in 1980 that the applicant's own returns to the Registrar of Companies had never disclosed that it was a shareholder of the company. At an extraordinary general meeting of the company held on 19 November 1980, Hiew, a director of and representing the applicant, was asked to produce the applicant's annual statements of accounts for the years 1973 and 1974 so as to enable E the company to ascertain whether the applicant was in fact a shareholder of the company. Hiew informed the meeting that he did not have them, he only had those for the years 1976 and later. The meeting then resolved that the applicant be required to produce the accounts within three weeks but the applicant failed to do so. The company says that because the F applicant could not prove that it held shares in the company, it was resolved at the extraordinary general meetings held on 5 June 1981 and 2 September 1981 respectively to suspend the applicant. However, this is contradicted by the annual return dated 31 December 1981 ('H-5') wherein it is stated that the applicant's shares were suspended at the eighth annual general meeting of the company held on 31 December 1981 pending G further investigation and resolution. The company also says that it had at all times made it clear to the applicant that the suspension would be lifted whenever the applicant could establish its right to membership, as reflected in the minutes of the adjourned eighth annual general meeting of the company held on 20 April 1982 (see exh CMF-1 at pp 45–48).

H The company further says that arising out of the failure of the applicant to prove that it held shares in the company, it investigated into the circumstances leading to the inclusion of the applicant as a shareholder and discovered, inter alia, that one Liow Su Fah ('Liow') was managing director of the applicant and of the company in 1973 and that both the applicant and the company had current accounts in the same bank, ie, I Citibank (then First National City Bank) in Penang. It was also discovered that two sums of money were paid to the company for the purchase of the company's shares, namely, RM640,000 on 21 August 1973 and RM1,760,000 on 16 February 1974 and that on 18 February 1974 Liow

tricked the company into paying him the sum of RM1,151,000. Various sums of money were paid out of the company's funds and unaccounted for, namely, two sums of RM130,000 and RM94,000 to Liow personally on 21 August 1973 and 12 November 1974; two sums of RM1,309,093.75 and RM1,151,550 to R Rajasingam & Co on 21 August 1973 and 19 February 1974; and one sum of RM599,999.90 to one Hiew Pau on 18 February 1974 (see exhs CMF-1, CMF-2 and CMF-3). At the time of the payments in and out of the company, Liow and Hiew Pau were the only two directors and shareholders of the applicant. On the basis of the foregoing, the company alleges that the business dealings of Liow and Hiew Pau were so intricately bound up with and inseparable from the applicant that payments of monies from the applicant to the company and payments of monies out from the company to either Liow or Hiew Pau, or both, were in fact payments to Liow and Hiew Pau; and that Liow and Hiew Pau had thus used the applicant as their corporate cloak in their fraudulent or otherwise unconscionable money transactions with the unsuspecting company.

The law relating to the jurisdiction of the court to rectify the register of members of a company is to be found in s 162 of the Companies Act 1965 which reads as follows:

> (1) If—
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> (a) the name of any person is without sufficient cause entered in or omitted from the register; or
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> (b) default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member,
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> the person aggrieved or any member or the company may apply to the Court for rectification of the register, and the Court may refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party to the application.
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> (2) On any application under subsection (l) the Court may decide—
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> (a) any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members or between members or alleged members on the one hand and the company on the other hand; and
>
> (b) generally, any question necessary or expedient to be decided for the rectification of the register.
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> (3) The Court when making an order for rectification of the register shall by its order direct a notice of the rectification to be so lodged.
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> (4) No application for the rectification of a register in respect of an entry which was made in the register more than thirty years before the date of the application shall be entertained by the Court.

The above-quoted section provides for a summary remedy. The jurisdiction of the court to grant the remedy under the section is general, but the exercise of it is discretionary. The discretion will only be exercised in favour of the applicant where the case is clear and free from difficulty or material doubt (see *Re Heaton Steel & Iron Co, Simpson's Case* (1869) 21 LT 629), but where the case is complicated and there is doubt as to the bona fides of the transaction, or where the case involves complicated

A questions of law and fact, the court will refuse to order rectification on a motion but will leave the applicant to seek rectification by way of an action (see *Luchmee Chund, Luchmee Chund v Bengal Coal Co* (1988) ILR 8 Cal 317 cited in *The Digest* Vol 9(2) (2nd Reissue) para 3620; and *Re Len Chee Omnibus Co Ltd* [1969] 2 MLJ 202). Moreover, the right to rectification under the section will also be destroyed by laches on the part of the B applicant (see *Re Len Chee Omnibus Co Ltd* and *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 244 at p 250).

The applicability of s 162 of the Companies Act 1965 was considered by the Federal Court in *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* where Raja Azlan Shah CJ (as he then was), in delivering C the judgment of the court, had this to say, at p 250:

> The point has been considered many times in many cases. We do not propose to refer to all of them, but it is worth referring to a few which put the matter in its proper perspective. The power to rectify the register under the section is a summary remedy. The court on an application under the D section may decide any question of title of any party to have his name entered or omitted from the register, whether such question arises between members and alleged members or between such persons and the company. It may also decide any incidental questions arising with the above, if expedient or necessary. Sometimes the summary procedure under the section is not an appropriate remedy. Thus where complicated questions of law and E fact arise it is, we think, only proper to refer the parties to a suit, because rectification can also be had by a suit (see *Re Len Chee Omnibus Co Ltd* [1969] 2 MLJ 202). In *Reese River Silver Mining Co v Smith* (1869) LR 4 HL 64, the application for rectification of the register on the ground of fraud and misrepresentations was by way of a suit against the company. And delay in applying for rectification will destroy the remedy. See *Re Len Chee* F *Omnibus Co Ltd* where it was held that two years delay was fatal; *Ansett v Butler Air Transport Ltd* (1958) 75 WN 299, where a suit for rectification of the share register was delayed in almost a year, it was held that the plaintiffs were not entitled to relief.

It is common ground that the applicant's shares were suspended by the company at its general meeting held on 31 December 1981. The question G that arises for consideration is whether the suspension could afford a ground for rectification of the register under s 162. On this point, learned counsel for the company submits that the section has no relevance to the applicant's motion on the ground that the applicant's complaint is not one that is catered for under the section, ie, that it does not fall within any of H the pre-conditions set out in sub-s (1)(a) and (b), because the applicant's name has not been omitted from the register — only the applicant's rights and privileges as a member have been suspended pending clarification of payment for the shares, which the applicant has agreed to give to the company. Learned counsel for the applicant, however, contends otherwise. He says that the word 'suspension' is not a term of art and its actual I meaning can be determined from the resolution at p 44 of CMF-1 and the letter H-4, and that the word omitted in s 162 should be interpreted broadly as the word suspension has the effect of removal which is equivalent to omission of the name from the register. With respect, I am unable to accept the construction given by learned counsel for the applicant. 'Suspension' merely operates as a temporary privation of rights and privileges of a member without his name being removed or erased from the register,

whereas 'omitted' involves either non-inclusion or removal of the name of the member from the register, which is a total deprivation of membership. I am therefore of the view that the present case does not fall within the section.

Assuming that s 162 is relevant, then the point arising to be considered is whether the court should exercise its discretion to order rectification under the section in the circumstances of the present case. The applicant says that it was registered as a shareholder of 2,399,999 shares in the company; that it had paid a total sum of RM2.4m to the company and the company had accepted the said sum as payment for the said shares. Upon these facts, learned counsel for the applicant submits that there is no basis in law for the company to suspend the applicant's shares after the applicant was duly registered upon full payment for the shares, and that such suspension is improper and was done without sufficient cause within the meaning of s 162, so as to entitle the applicant to an order for rectification of the register. I would have agreed with this submission had it not been for the presence of other facts which, inter alia, casts a serious doubt as to the bona fides of the transaction, ie, whether the sum of RM2.4m paid by the applicant to the company was intended for the purchase of the shares in the company, having regard to the fact that the applicant's own accounts have not shown that it owns shares in the company. As to this, the applicant offers no explanation. In the circumstances, it would not be right for me to dispose of the matter summarily. In my judgment, the case should be dealt with by way of an action. I therefore decline to make the order sought under the section.

There is yet another ground against the grant of the summary remedy under s 162 even if the present case falls within that section, inasmuch as there has been an unreasonable delay on the part of the applicant in making the application. The applicant had full knowledge that its rights as a shareholder of the company were affected as far back as 30 September 1981. It only took out the present motion on 10 October 1984. That was some three years after it had knowledge that its rights were affected. In my view, the delay was unreasonable and the applicant is guilty of laches which is sufficient to deprive it of the relief sought under s 162. As stated by Raja Azlan Shah J (as he then was) in *Re Len Chee Omnibus Co Ltd* at p 203:

> The court, having concurrent equitable jurisdiction, is not bound to follow what a court of law would do in such a case in adjudicating under s 162 of the Companies Act but will take cognisance of well-known equitable principles. In the words of Lord Camden LC in *Smith v Clay* (1767) 3 Bro CC 639n at 640n a court of equity 'has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing.'

For the reasons above stated, I would dismiss the applicant's motion with costs.

Application dismissed.

Reported by Pearl Wee